IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

SUIT NO. 57 OF 2000

IN

PETITION NO.1205 OF 1999

Joseph George Gomes @ J.G.Gomes. ...Deceased

Nancy Joe Vaz, of Bombay,)
Indian Christian Inhabitant,)
An Adult, residing at Mill)
House, Rathodi Village, Marve)
Road, Malad (West), Bombay)
400095, being the younger sister)
of the deceased herein and the)
one of the Legatees and)
Beneficiaries named in the last)
Will and Testament of the)
Deceased herein.) ...Petitioner/
Plaintiff

vs.

1. Yucca Gomes, an adult age about 45 years, residing at Rose Villa, Rathodi Village, Marve Road, Malad(W), Mumbai 400095, the spinster daughter of Innocence John Gomes the pre-deceased brother of the deceased herein.

2. Jessie Gomes, an adult age about 80 years residing at Rose Villa, Rathodi Village, Marve Road, Malad (W), Mumbai 400095, the widow of Innocence John Gomes the pre-deceased brother of the deceased.

3. Receda Cardoz nee Receda Gomes, an adult, age about 43 years residing at 15, Sheldon Ii floor, Ipse Nraz’z colony, Behind St.Anne’s Orlem, Malad(W)) Mumbai-400064. The married daughter of Innocence John Gomes the pre-deceased brother of the deceased herein.

4. Rudyard Gomes, an adult, age about 41 years, residing at

Rose Villa Rathod Village Marve)
Road, Malad (W), Mumbai-400095.)
The son of Innocence John Gomes)
the pre-deceased brother of the)
deceased herein.)
5. Ulrich Gomes, an adult,)
age about 40 years, residing at)
Rose Villa, Rathod Village,)
Marve Road, Malad (W), Mumbai)
400095, The son of Innocence)
John Gomes the pre-deceased)
brother of the deceased herein.) ... Caveators/
Defendants

Mr.A.J.Almaida, for Plaintiff.

Mr.Anand Grover i/b. Prakash Mahadik, for Defendants

CORAM: D.K.DESHMUKH, J.

DATED: 9th NOVEMBER,2006.

ORAL JUDGMENT

1. The testamentary petition no.1205 of 1999 was filed by Nancy Joe Vaz for grant of letters of administration with the Will attached, the will is alleged to have been left behind by one Joseph George Gomes who expired on 2.6.1999. The Will is dated 17.12.1985. As the caveats were filed by the defendants, the petition was converted into a civil suit. On the basis of the affidavits filed by the caveators in support of the caveats contesting validity of the Will, the Court by order dated 29.7.2004 has framed the following issues:-

> "1. Does the Plaintiff/petitioner prove that the Will dated 17th December,1985 was validly executed by the deceased and it is her last Will?
>
> 2. Does the Respondents prove that the Will was false, fabricated and was obtained under undue influence?

2. The plaintiff/petitioner has examined one

Mr.M.M.Shanbhag as witness. The petitioner/plaintiff has also examined herself as witness. The defendants have also examined themselves as witnesses.

ISSUE NO.1

3. In the plaint, the plaintiff claims that the Will dated 17.12.1985 is the last Will left behind by the deceased and that in the Will no one is nominated as executor. A copy of the Will is at Exhibit B to the plaint. The Will is handwritten but the plaintiff does not claim in the plaint as to in whose handwriting the Will is. Perusal of the Will shows that it is signed by the deceased and that there are two witnesses attesting the signature of the deceased. The first attesting witness is Shri.M.M.Shanbhag and the second attesting witness is Smt.S.M.Shanbhag. Out of the two attesting witnesses, Mr.M.M.Shanbhag has been examined as witness. In the examination in chief P.W.1 Mr.Shanbhag states that at the request of the deceased he visited the house of the deceased in the year 1985 alongwith his wife. He states that the Will was written by the deceased in his own handwriting. He states that the Will was signed by the deceased in his presence and that he himself and

his wife have attested the signature of the deceased on the Will. It appears that when the oral evidence in this matter was recorded, other attesting witness i.e. wife of P.W.1 Mr.Shanbhag was no more. P.W.1 states that he is an Advocate by profession. He states that he knew Gomes family as also the family of the plaintiff. The learned Counsel appearing for plaintiff submitted that following are the admitted positions:-

(i) that the plaintiff is the sister of the deceased.

(ii) that the caveators are the sons of the brother of the deceased by name Innocence who pre-deceased the deceased.

(iii) that the deceased was bachelor and was staying with the caveators.

(iv) that the plaintiff is staying at Matheran.

(v) Maria the daughter of the plaintiff is a Godchild of the deceased.

(vi) The deceased had a joint bank account with

the plaintiff's daughter Maria as also with defendant no.1 Yucca.

The learned Counsel submits that the attesting witness Mr.M.M.Shanbhag has deposed that the Will was signed by the deceased in his presence and that the Will is in the handwriting of the deceased. According to the plaintiff, the evidence of attesting witness is corroborated by the plaintiff who has stated that the Will is in the handwriting of the deceased and it bears the signature of the deceased. It is submitted that the defendants in their affidavit have admitted that the Will appears to be in the handwriting of the deceased. According to the learned Counsel, even after cross examination the credibility of the witness P.W.1 is not shaken. It is submitted that the evidence given by P.W.1 is trustworthy and it cannot be discarded. According to the learned Counsel, thus the plaintiff has proved the signature of the deceased on the Will and therefore, the plaintiff is entitled for grant of letters of administration with the Will attached. It is submitted on the other hand that the evidence produced by the defendants does not establish their case that the Will is forged and fabricated document. It is submitted that once the propounder proves the

due execution and the testamentary capacity of the testator, the onus on the propounder to prove the Will stands discharged. It is submitted that so far as the testamentary capacity of the deceased is concerned, there is no doubt expressed about it by anybody, the plaintiff has proved the signature of the deceased on the Will and therefore, the Will stands proved.

4. The learned Counsel appearing for defendants on the other hand submits that though it is submitted by the learned Counsel appearing for plaintiff that the Will is in the handwriting of the deceased, pleading to that effect is not to be found in the plaint. It is submitted that in the deposition the attesting witness does claim that the Will is in the handwriting of the deceased. It is submitted that the attesting witness has stated that the deceased had shown him the Will which was already written. The plaintiff also states that the Will is in the handwriting of the deceased but neither the plaintiff nor the attesting witness states that they have seen the deceased writing the Will. It is submitted that neither the attesting witness nor the plaintiff say that they are familiar with the handwriting of the deceased. It is submitted that without the attesting

witness and the plaintiff claiming that they are familiar with the handwriting of the deceased, their statement that the Will is in the handwriting of the deceased cannot be accepted. It is further submitted that in his deposition the defendant no.4 Mr.Rudyard Gomes has stated that he is familiar with the handwriting and the signature of the deceased and he has stated that the Will is not in the handwriting of the deceased. The learned Counsel submits that thus, there is only one witness of all the witnesses who have been examined in the case viz.Rudyard Gomes-Defendant no.4 who states that he is familiar with the handwriting of the deceased and he categorically states that the Will is not in the handwriting of the deceased. According to the learned Counsel therefore, the plaintiff has not proved that the Will is in the handwriting of the deceased. The learned Counsel further submits that the statement made by the attesting witness that the Will was signed by the deceased in his presence cannot be accepted because Mr.Shanbhag is not a reliable witness. It is submitted that the plaintiff has also deposed that the signature on the Will is that of the deceased, however she does not claim that she is familiar with the signature of the deceased. In the absence of plaintiff claiming that she is

familiar with the signature of the deceased, according to the learned Counsel, her statement that the signature on the Will is that of the deceased cannot be accepted. In support of the claim that Mr.Shanbhag is not a reliable witness, the learned Counsel submits that Mr.Shanbhag was not known to the deceased and therefore, he is not a natural witness to the Will.

5. The learned Counsel appearing for both the sides took me through the deposition of all the witnesses and made their comments in detail. The learned Counsel for the defendants submits that, according to the plaintiff, she found the Will of the deceased in Mill house which is the house occupied by the plaintiff. Finding of Will at Mill house, according to the defendants, is unnatural. Admittedly the deceased was never residing in the Mill house, throughout he was residing at Rose Villa alongwith the defendants. It is further submitted that bequest of share to the plaintiff in Rose Villa is unnatural in view of the family arrangement which was brought about by the mother of the deceased and also because of the cordial relation between the deceased and the defendants with whom he was staying till his death. According to the learned Counsel

therefore, as the plaintiff has not been able to discharge the burden that the Will propounded by her is genuine and valid last Will of the deceased, the suit is liable to be dismissed.

6. From the rival submissions, it is clear that the plaintiff claims that the Will is in the handwriting of the deceased. The Supreme Court by its judgment in the case "Shashi Kumar Banerjee & others Vs. Subodh Kumar Banerjee, AIR 1964 Supreme Court 529" has held that when the Will is in the handwriting of the testator and when in the Will itself the testator states that he has signed the Will then very little evidence is required to prove due execution and attestation of the Will. Therefore, the first question I propose to consider is whether the plaintiff has established that the Will is in the handwriting of the deceased? So far as the pleadings are concerned, in the plaint there is no averment to be found that the Will is in the handwriting of the deceased. The attesting witness Mr.Shanbhag states "I say that the Will was written by Joseph George Gomes in his own handwriting." In cross examination this witness states thus:-

"Q. You did not talk to your wife

about the purpose of your visit?
When Mr.Gomes was out of the room?
Ans. I did not have to because after we entered there Mr.Gomes told us that he had called us in order to witness a Will he has made.
He showed us the Will as it is in the present form without the signatures."

It is thus, clear that this witness has not seen the deceased writing the Will because he says that when he went to Rose Villa the place where the deceased was residing, the Will was already written. The witness also nowhere states that he is conversant with the handwriting of the deceased and therefore, he identifies the handwriting of the deceased and hence, he says that it is in the handwriting of the deceased. Therefore, so far as the attesting witness is concerned, the evidence of the attesting witness does not establish that the Will was written by the deceased in his own hand. The other witness examined by the plaintiff is the plaintiff herself. In her examination in chief she states thus:-

"That I am the Plaintiff in the above suit. I have filed the petition for Letters of Administration of the last Will executed by my deceased brother

> Joseph George Gomes. My brother died on 2.6.1999 at Mumbai. He had executed the Will in his own writing in the year 1985."

The plaintiff nowhere in her deposition claims that she saw her brother the deceased writing the Will. She also does not say that she is familiar with the handwriting of the deceased. Thus, the claim made by the plaintiff that the Will is in the handwriting of the deceased also cannot be accepted in the absence of statement being made by her that she is familiar with the handwriting of the deceased and that she is in a position to recognise and identify his handwriting. Thus, the position that emerges is that there is neither pleadings to the effect that the Will is in the handwriting of the deceased nor there is any reliable evidence led by the plaintiff to prove that the Will is in the handwriting of the deceased. It was claimed on behalf of the plaintiff that on behalf of the defendants it is admitted that the Will is in the handwriting of the deceased. The learned Counsel appearing for plaintiff submitted that in the affidavits filed in support of the caveat the defendants have stated that the Will appears to be in the handwriting of the deceased. However, I have perused the affidavits filed in support of the

caveat. Those affidavits show that according to the defendants the Will propounded by the plaintiff is a forged and fabricated document. Therefore, there is no question of defendants admitting that the Will is in the handwriting of the deceased.

7. So far as the evidence led on behalf of the defendants is concerned, the defendant no.5 Ulrich Gomes on he being shown the Will during his cross-examination states "It does not appears to be in the handwriting of Uncle Joe. It does not seems to be the signature of the deceased." Then he states thus:-

> "Q. If I put it to you that the handwriting of the Will Exhibit A and signature thereto is of your uncle deceased, can you deny it?
>
> Ans. Yes."

The defendant no.1 Yucca Gomes on being shown the Will states thus:-

> Q. This is the handwriting of your uncle?
>
> Ans. It does not resemble the writing of my uncle. Witness volunteers

that my uncle lived with us and he died at Rose Villa and if ever there was a Will he would have certainly told us about it.

So far as the defendant no.4 Mr.Rudyard Gomes is concerned, he was shown the Will and was asked thus:-

Q. This is the handwriting of your uncle deceased Joe Gomes?

Ans. No.

Q. Does it resemble to the handwriting of your uncle?

Ans. May be.

(Shown the signature on the will)

. This is not the signature of my deceased uncle Joe. The signature does not resemble to the signature of my deceased uncle.

Q. You are very much conversant with the signature and handwriting of your uncle?

Ans. I can identify his signature and handwriting.

Q. Can you produce any handwriting or

signature of your uncle?

Ans. No.

Q. If I put it to you that this is the handwriting of your uncle and this is the signature of your uncle, can you deny that?

Ans. Yes.

Q. I put it to you this is the Will of your uncle Joe Gomes in his handwriting?

Ans. I stand by what is stated earlier."

Thus, it cannot be said that the defendants have admitted that the Will is in the handwriting of the deceased. On the contrary, they have categorically stated that the Will is not in the handwriting of the deceased. From the cross-examination of defendant no.4 Rudyard Gomes quoted above it becomes clear that during the cross examination he was specifically asked whether he was conversant with the handwriting of the deceased and he accepted that he is conversant with the handwriting of the deceased and then he denied that the Will is in the handwriting of the

deceased. The position that emerges that there is only one witness viz. defendant no.4 Rudyard Gomes who states that he is familiar with the handwriting of the deceased and he categorically states that the Will is not in the handwriting of the deceased. In the face of such evidence on record, in my opinion, it cannot be said that the plaintiff has established that the Will propounded by the plaintiff is in the handwriting of the deceased.

8. Before considering the evidence on record about attestation of the signature of the deceased on the Will, in my opinion, it will be appropriate to note some admitted positions. That

(i) the deceased was a bachelor and throughout his life he was living with the family of his brother Mr.Innocence.

(ii) that the deceased was extremely fond of his brother Mr.Innocence who pre-deceased him. During his life time, it is the family of his brother Mr.Innocence who was taking care of the deceased.

(iii) that the deceased never stayed at Mill House which is the residence of the plaintiff.

9. It is claimed by the defendants that Mr.Shanbhag the attesting witness is not a natural

witness. He was not at all known to the deceased. On the contrary, Mr.Shanbhag was a lawyer engaged by the plaintiff and was representing her in the litigations that were filed by her. Mr.Shanbhag was also a closed friend of the family of the plaintiff. In his deposition in examination in chief P.W.1 states that he knew and was well acquainted with the deceased. But he does not indicate as to how he came to know the deceased. The attesting witness claims that he knows the Gomes family and he also states that he knows the plaintiff because she is his client. In the cross examination he narrated in great details as to how he came to know the plaintiff, how he was retained by her as her lawyer, how he became a close family friend of the plaintiff. But he does not anywhere state in the deposition as to how he came to know the deceased? what was the occasion? He claims that he visited Rose Villa where the deceased was residing whenever he had call from the deceased but he does not elaborate as what was the occasion for the deceased to call him at his residence. Thus, the evidence of the attesting witness does not establish that he was acquainted with the deceased. Perusal of the deposition of this witness shows that though he claims to have visited Rose Villa 10 to 12 times he is not acquainted with

the topography of the Rose Villa. Though, he claims to have known the deceased, he does not appear to be aware of the habits of the deceased. The plaintiff in her deposition admits that there was a dog in the compound of the Rose Villa always and there were also geese in the compound, but the attesting witness appears to be totally unaware of this. The witness claims that on the day on which the deceased is alleged to have signed the Will in the year 1985 he was at Rose Villa for about two hours and he did not find any member of the family of the defendants in Rose Villa. But cross examination of defendant no.1 Yucca shows that on 17.12.1985 he was at home and that after he came back from the school on that date he was available at home. He states that on that day nobody visited the deceased. He further states that he came back from the school at 1.30 p.m. and before that his brother Ulrich was at home. It is stated by him that at that time his mother was seriously ill and therefore, he or his brother were always at home to look after the mother. This evidence has come in the cross examination. The statements made by the defendant no.5 Mr.Ulrich, in my opinion, are more natural and acceptable than the statements made by the attesting witness. What is pertinent to note is that if according to the attesting witness he was

called by the deceased for witnessing his signature on the Will and if when the witness went to Rose Villa, the Will was already written and it was shown to him by the deceased, the witness does not explain as to why they waited at Rose Villa for two hours for attesting the signature of the deceased on the Will. What is pertinent to be noted is that the day 17.12.1985 was a working day and the wife of the attesting witness who is also the second attesting witness was in government service. The witness nowhere explains as to what he, a practising advocate and his wife a government service, were doing for two hours in Rose Villa on a working day. Even if it is assumed that they were called by the deceased for witnessing his signature on the Will and if the Will was already written down, why were they waited for two hours. In my opinion, the version of the events of the day given by the attesting witness is totally unreliable. What I found extremely strange about the Will propounded by the plaintiff is that the Will was found by the plaintiff not at Rose Villa where the deceased used to stay but was found at Mill House which is the residence of the plaintiff. The plaintiff in her deposition states thus:-

> " After the death of Mr.Joseph Gomes we opened a cabinet where Mr.Gomes kept

> all his papers in my house in Mill House, Mumbai, next to Rose Villa. We found the Will when the papers pilled out. At that time my daughter Maria was with me. I do not remember the time but it happened during the course of the day. There is no lock, Maria opened the cabinet to find out Mr.Joseph Gomes papers and our papers."

It has come on record in the evidence of the plaintiff herself that even the plaintiff was not going to Mill House regularly since 1985 because she was running Hotel at Matheran. She has stated that her brother Innocence and Joseph the deceased were very close. In the year 1977 Mr.Innocence expired. She has stated that during the life time of Mr.Innocence the deceased was residing with the family of Mr.Innocence and even after the death of Mr.Innocence Gomes the deceased continued to reside with his brother's family and his needs were look after by the Widow of Innocence and her children. She has nowhere stated that the deceased was residing at the Mill House at any time. Therefore, I find it extremely improbable that he will keep his Will in a cabinet which does not have any lock in the Mill

House. I also find considerable substance in the statement made on behalf of the defendants that it is unnatural and extremely improbable that the deceased in the Will has given share in the Rose Villa the house occupied by his brother's family throughout, to the plaintiff who was already given a house by her mother i.e. Mill house. The plaintiff admits in her deposition that relation between the deceased and the family of his brother Mr.Innocence were very good. Therefore, I find it improbable that a person in the situation in which the deceased was, will deprive the family which was taking care of him, of 50% share of the Rose Villa which they were occupying. Thus, I find that the testimony of the attesting witness who has been examined in the case is not reliable without it being corroborated and I do not find any corroboration on record. Therefore, it has to be said that the plaintiff has failed to prove that the signature of the deceased on the Will is attested by P.W.1. In view of this finding, issue no.1 has to be answered in the negative. It is accordingly so answered.

ISSUE NO.2

10. So far as issue no.2 is concerned, as I find

that the plaintiff has not discharged the burden to prove the Will propounded by the plaintiff, it is not necessary for me to consider issue no.2.

11. In the result therefore, the suit fails and is dismissed. The plaintiff is directed to pay cost of this suit to the defendants as incurred by the defendants.